

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

LINDA SHORT,)	
)	C.A. No. 09A-06-007 (JTV)
Claimant Below-)	
Appellant)	
v.)	
)	
ACME MARKETS,)	
)	
Employer Below-)	
Appellee.)	

Submitted: January 4, 2010

Decided: March 26, 2010

Walt F. Schmittinger, Esq., Schmittinger & Rodriguez, Dover, Delaware.
Attorney for Appellant.

Cheryl A. Ward, Esq., Heckler & Frabizzio, Wilmington, Delaware. Attorney for
Appellee.

Upon Consideration of Appellant's Appeal
From Decision of the Industrial Accident Board
REVERSED AND REMANDED

VAUGHN, President Judge

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ORDER

Upon consideration of the briefs of the parties and the record of the case, it appears that:

1. The claimant, Linda Short, appeals from a decision of the Industrial Accident Board that denied her request for attorneys' fees. The IAB awarded the claimant 20 weeks of benefits for the disfigurement of her left knee but denied the claimant's request for attorneys' fees.

2. The scope of review for an appeal from the IAB is limited to an examination of the record for errors of law and a determination of whether substantial evidence is present to support the IAB's findings of fact and conclusions of law.¹ Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.² When the issue raised on appeal is exclusively a question of the proper application of the law, the review by the court is *de novo*.³

3. The claimant contends that the IAB erred as a matter of law by failing to award reasonable attorneys' fees relating to her successful Petition to Determine Disfigurement Benefits.

4. In its decision, the IAB acknowledged that the claimant's success in obtaining an award for disfigurement would ordinarily entitle her to an award of

¹ *Porter v. Insignia Mgmt. Group*, 2003 WL 22453316, at *3 (Del. Super.) (citing *Histed v. E.I. Dupont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993)).

² *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. 1986).

³ *Porter*, 2003 WL 22453316, at *3 (Del. Super.).

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attorneys' fees. It denied her request for attorneys' fees, however, on the grounds that the employer had given the claimant a settlement offer of an amount equal to or greater than the amount ultimately awarded by the IAB at least 30 days prior to the hearing date. The statutory provision involved is 19 *Del. C.* § 2320(10)(b), which reads in pertinent part:

In the event an offer to settle an issue pending before the Industrial Accident Board is communicated to the claimant or the claimant's attorney, in writing, at least 30 days prior to the trial date established by the Board on such issue and the offer thus communicated is equal to or greater than the amount ultimately awarded by the Board at the trial on that issue, the provisions of paragraph a. of this subdivision shall have no application.

5. Both parties agree that the settlement offer was made on January 20, 2009, and that the hearing was on February 18, 2009. The statute itself does not specify the manner in which the 30 days are counted. I therefore conclude that time should be counted in accordance with Superior Court Civil Rule 6(a), which applies to calculations of time prescribed or allowed by statute as well as time under the court's rules or under an order of the court. By its express terms, the rule applies to time following an event. When applied to time preceding an event, I conclude that time is counted under the rule as follows: the day of the event is the hearing date, February 18, which is not counted; day one is February 17; day two is February 16; and so on. This results in January 19 being the 30th day prior to the hearing. Since the offer was not made until January 20, it was untimely, and an award of fees is not barred by the statute. Accordingly, the IAB erred as a matter of law when it denied the claimant's

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request for attorneys' fees pursuant to 19 *Del. C.* § 2320, and the claimant is entitled to an award of attorneys' fees.

6. For the aforementioned reasons, the IAB's decision is ***reversed and remanded*** for further proceedings in accordance with this order.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr

President Judge

oc: Prothonotary
cc: Order Distribution
File